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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

20145

FILE: B-202094.3

DATE: November 30, 1981

MATTER OF: Defense Industries, Incorporated

DIGEST:

1. To the extent that protester contends that solicitation should not have allowed consideration of offers based on use of facilities other than previous supplier's, protest is untimely because it alleges solicitation defect, which should have been filed prior to due date for submission of initial proposals under section 21.2(b)(1) of GAO Bid Protest Procedures.
2. Contention that awardees may not have capability and capacity to meet pro rata share of mobilization base commitment is a challenge to affirmative determination of awardees' responsibility, which is not for review by our Office except in circumstances not present here.
3. Allegation of improper conduct by preaward survey team will not be reviewed since protester lost competition on the basis of price alone and negative preaward survey did not competitively prejudice protester.
4. Contention that protester should have received special consideration because it is a small business is denied. Solicitation was unrestricted and, therefore, special consideration to any small business would have been improper.
5. Protest alleging that contracting officer deceived protester regarding exact quantities to be ordered is denied since solicitation clearly required quotations for various ranges of quantities for each item being procured, all offerors competed on an equal basis, and there is no evidence of deception.

6. Protest that contracting agency never formally notified protester that awards had been made is denied since there is ample evidence that protester was notified both formally and informally of awards and notification of awards was published in the Commerce Business Daily.
7. Allegation that offers based upon use of Government-furnished equipment and previous supplier's facility should be credited with saving Government costs of removing, refurbishing, maintaining, and storing Government equipment is dismissed as untimely since solicitation enunciated evaluation factors and did not include costs proposed by protester. Accordingly, this issue concerns an alleged solicitation defect which should have been protested before the closing date for receipt of initial proposals under section 21.2(b)(1) of GAO Bid Protest Procedures.
8. Protest alleging that awardees submitted alternate proposals changing methods of manufacture in contravention of solicitation is denied since agency reports that alternate proposals were rejected by contracting officer and awards were based on proposals which did not vary the manufacturing methods required by the solicitation.
9. Where small business is determined to be nonresponsible, matter must be referred to Small Business Administration under 15 U.S.C. § 637(b)(7)(A) and, therefore, allegation that contracting officer should not have recommended that offeror apply to Small Business Administration for certificate of competency is denied.
10. Allegation of possible criminal activity is dismissed since enforcement of criminal statutes is charged to Department of Justice and matter has been referred to Federal Bureau of Investigation by contracting agency.

11. Protest, contending that request for best and final offers contradicted original solicitation's stated intention to reestablish mobilization base commitments and amounted to sole-source award for two items being procured, is dismissed as untimely. Alleged contradiction was apparent from reading of November 20, 1981, request for best and final offers and, therefore, had to be filed before due date for receipt of best and final offers in accord with section 21.2(b)(1) of GAO Bid Protest Procedures.
12. Contention that split awards to two offerors based upon proposals which did not indicate intention to utilize Government-furnished property (GFP) are improper under solicitation is denied because protester's interpretation of solicitation is unreasonable where solicitation stated that "more than one award may be made to offerors not utilizing the GFP."

Defense Industries, Incorporated, has protested the awards of contracts for production of various types of 20-mm. projectiles to Galion Amco, Incorporated, and Wells Marine, Incorporated, pursuant to solicitation No. DAAA09-80-R-0358 issued by the United States Army Armament Materiel Development and Readiness Command, Rock Island, Illinois. The protester has raised a great number of arguments which it believes invalidate the awards. However, our review of the record leads us to the conclusion that all of the protester's arguments have either been untimely filed, are not appropriate for our consideration, or are without merit. Accordingly, the protest is denied in part and dismissed in part.

The first issue raised by Defense Industries is that the primary reason for this solicitation's issuance was to reestablish and maintain the mobilization base commitments of the previous contractor for the subject projectiles and Defense Industries contends that the awards to Wells Marine and Galion Amco will not accomplish this end. The previous

mobilization base supplier was terminated for default and its Long Beach, California, plant and Government-owned equipment were available for use by offerors under the terms of the present solicitation. Defense Industries argues that, since the two awardees chose not to use the Long Beach plant, the Army has not reestablished its mobilization base because only by continued use of the previous contractor's facility can the mobilization base be maintained.

The solicitation was issued on September 19, 1980, and required submission of proposals by October 15, 1980. The Executive Summary contained in section "A" of the solicitation indicated that the bulk of the items was being reprocured because of the default termination of several contracts held by the previous supplier. Regarding mobilization commitments, the Executive Summary stated, in pertinent part:

"In addition, the Government intends to reestablish the mobilization commitments formerly assigned to its previous supplier. Accordingly, if an offeror bases its proposal on utilization of a site other than that indicated herein, the offeror must demonstrate the capability and capacity to meet mobilization requirements * * *. If this solicitation results in more than one award, the awardee(s) must demonstrate the capability and capacity to meet a prorated share of the mobilization base indicated above based on the awarded items."

To the extent that Defense Industries is contending that the solicitation should not have allowed consideration of offers which were based on use of facilities other than the Long Beach plant, the protest is untimely under section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 21 (1981). Defense Industries should have protested this alleged impropriety in the solicitation prior to the closing date for receipt of initial proposals since it was apparent from the initial solicitation that offers based on use of a different facility than that at Long Beach would be considered. However, Defense Industries' initial protest was not filed in our Office until February 9, 1981.

To the extent that Defense Industries is questioning the capability and capacity of the awardees to meet their prorated share of mobilization base commitments, the protest concerns affirmative determinations of responsibility which are not generally for review by our Office. Mars Signal Light Company, B-204994, October 21, 1981, 81-2 CPD _____. Moreover, the Army has determined that Wells Marine and Galion Amco can meet their pro rata shares of the previous supplier's mobilization base commitments without using the Long Beach plant. See Fermont Division, Dynamics Corporation of America; Onan Corporation, 59 Comp. Gen. 533 (1980), 80-1 CPD 438. Therefore, this portion of the protest is dismissed.

Defense Industries next contends that it was prejudiced, slandered, and libeled by the preaward survey board which conducted a preaward survey on Defense Industries and returned a negative determination. The record shows, however, that Defense Industries lost the competition on the basis of price alone. A preaward survey on Defense Industries was conducted in order to expedite matters in the event that Defense Industries was put in line for award by virtue of one of the low offerors being found nonresponsible or otherwise ineligible for award. We will not review the allegations of improper conduct by preaward survey team members since their negative determination had no bearing on Defense Industries' not receiving the contract and, therefore, did not prejudice Defense Industries concerning the outcome of the competition. See KET, Inc.--Request for Reconsideration, B-190933, January 12, 1981, 81-1 CPD 17. Accordingly, this portion of the protest is dismissed.

A third argument made by Defense Industries concerns the fact that it is a small business and was not given any special consideration because of its status by the Army in conducting this procurement. This argument lacks merit in view of the fact that the procurement was unrestricted and, therefore, special consideration because of a firm's small business status would have been improper. We note that both Wells Marine and Galion Amco are also small business concerns. Accordingly, this portion of the protest is denied.

The protester's next arguments are that the contracting officer deceived it regarding the quantities of 20-mm. projectiles to be ordered and that the protester should have been credited with any expenses it would have saved the Army by using the available Government-furnished equipment and the Long Beach plant rather than having the Army close the facility.

A review of the solicitation shows that it required quotations from offerors for varying ranges of quantities for each type of projectile being procured. We think it should have been clear to Defense Industries that exact quantities to be ordered were not known to the Army at the outset of the procurement. Further, the solicitation clearly specified in section "M" all factors to be taken into account in the evaluation process. Instead of giving an advantage to competitors proposing to use Government-furnished equipment, such proposals were to be charged with rental therefor. There was no evaluation factor as advanced by the protester. If Defense Industries believed these aspects of the solicitation to be improper, it should have protested in a timely manner before the closing date for receipt of proposals under section 21.2(b)(1) of our Procedures. Since it did not, these portions of the protest are denied.

The next issue filed by Defense Industries is that the contracting officer never formally notified it that the split awards to Galion Amco and Wells Marine were made on January 30, 1981. This portion of the protest is denied since the record shows that formal notification of award was sent to all unsuccessful offerors on February 2 and that notifications of the awards were sent to the Commerce Business Daily for publication on January 30. Moreover, even if the contracting agency had failed to promptly notify the protester of the awards, such a procedural irregularity would not affect the validity of the awards. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172.

Defense Industries further contends that both awardees violated the terms of the solicitation because they offered alternate proposals which were based upon an "extrusion" method of manufacture, while the solicitation allegedly specifically excluded use of the

extrusion method and further indicated that alternate proposals would not be accepted. The Army reports that the impact extrusion method is cited as an approved method in a technical data package list incorporated into the solicitation. Furthermore, the Army admits that while both awardees submitted alternate proposals which proposed methods of fabricating certain projectiles other than those cited in the specifications and technical data package, the contracting officer rejected those proposals. The contracts awarded were based upon proposals which did not vary the methods required under the solicitation and incorporated data packages. Since the record supports the Army on this issue, this portion of the protest is denied as without merit.

Defense Industries also contends that Wells Marine was qualified as a responsible mobilization base supplier based upon its submission of a projectile which was similar but not identical to that called for in the solicitation. Defense Industries contends that Wells Marine is not capable of producing the required projectile in the required quantities. This allegation deals with the awardee's capability to produce the required product and is, therefore, a matter of responsibility. As previously stated, we do not review affirmative determinations of responsibility unless fraud is alleged or definitive responsibility criteria have not been met. Mars Signal Light Company, supra. Neither exception is applicable here. Furthermore, it is the protester who bears the burden of affirmatively proving its case. Where, as here, the agency and protester disagree, the protester has not met its burden of proof. Kessel Kitchen Equipment Co., Inc., B-190039, March 2, 1978, 78-1 CPD 162.

In connection with the Army's determination that Wells Marine was responsible, the protester contends that the Army should not have recommended that Wells Marine apply to the Small Business Administration for a certificate of competency. The record shows that initially the contracting agency found Wells Marine to be nonresponsible and referred the matter, as required by law, to the Small Business Administration under its certificate of competency jurisdiction. 15 U.S.C. § 637(b)(7)(A) (Supp. III, 1979). Upon reevaluation, however, the Army found Wells Marine

responsible and the matter was not reviewed by the Small Business Administration. We find nothing improper in the Army's handling of this matter and the protest is denied on this point.

Defense Industries also alleges that there has been theft of Government property at the Long Beach plant. Further, the protester charges that the Army plans to dismantle this plant and that this will destroy any evidence of the alleged theft. This allegation concerns possible criminal misconduct under the previous contract. The Army reports that this matter has been referred to the Federal Bureau of Investigation for investigation. Since the enforcement of criminal statutes is charged to the Department of Justice, rather than our Office, this protest issue is dismissed. Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126; Maryland Machine Tool Sales, B-200736, June 30, 1981, 81-1 CPD 541.

Defense Industries' next basis for protest is derived from the Army's request for best and final offers, dated November 20, 1980, which stated:

"Items 0001 and 0007 for purpose of award are to be treated as one item and will not be split to more than one offeror * * *."

Defense Industries contends, among other things, that this was in contradiction to the Army's stated intention of reestablishing mobilization base commitments and, in effect, amounted to a sole-source award to the current supplier. This issue is untimely and will not be considered on its merits because it should have been filed by the due date for receipt of best and final offers (December 4, 1980) in accord with section 21.2(b)(1) of our Procedures.

Finally, Defense Industries charges that under the terms of the solicitation, the Army was required to award to at least one offeror proposing on the basis of using the Long Beach facility. The protester contends that splitting the award between Wells Marine and Galion Amco, neither of whom proposed to use the

Long Beach plant, was in direct contravention of directions contained in paragraph 4 of the solicitation's Executive Summary and in the request for best and final offers.

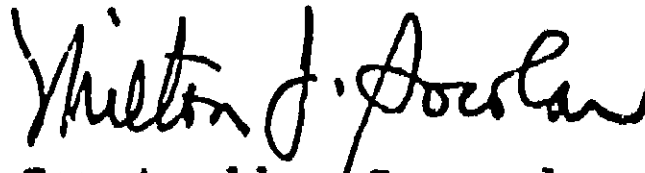
In this connection, the Executive Summary stated:

"Award based on using the GFP [Government-furnished property] will be made to one offeror who is the low, responsive, responsible offeror. However, more than one award may be made to offerors not utilizing the GFP in this solicitation."

The request for best and final offers further stated that the Government "will limit any split award to include only one offeror electing to use the GFP."

We think it is clear from this language that at most one offeror using Government property would be awarded a contract. Defense Industries' interpretation that the Army was required to award to at least one offeror using Government property is unreasonable since the Army's mobilization base needs may be satisfied by contractors having sufficient plant capacity without use of the GFP in Long Beach. Further, the split awards to Galion Amco and Wells Marine were proper in view of the express statement that "more than one award may be made to offerors not utilizing the GFP." Accordingly, this portion of the protest is without merit.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States